Supreme Court, U.S.
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No. 90-857

In The

Supreme Court of the United States

October Term, 1991

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF ON THE MERITS OF PETITIONER ON REARGUMENT

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QUESTION PRESENTED ON REARGUMENT:

Whether the history of the Speedy Trial Clause of the Sixth Amendment supports the view that the clause protects a right of citizens to repose, free from the fear of secret or unknown indictments for past crimes, independent of any interest in preventing lengthy pretrial incarceration or prejudice to the case of a criminal defendant?

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SUMMARY OF ARGUMENT

The history of the Speedy Trial Clause of the Sixth Amendment establishes the right is one of long standing which has been jealously guarded for centuries. Indeed: "Some thought the right of speedy trial and similar rights were so clearly a part of our "liberty" that no Bill of Rights was necessary. But the American people wanted to be sure, and gave the right of speedy trial first place in the Sixth Amendment. . . . " *United States v. Provoo*, 17 F.R.D. 183, 196 (D.M. 1955), *aff'd*, 350 U.S. 857 (1955) (footnote omitted).

The right to a speedy trial attached in this case upon the filing of the public indictment. The eight and one-half year delay from indictment to arrest is attributable to the government. The government rather than the petitioner bears the ultimate responsibility for such circumstances. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

Petitioner had no duty to bring himself to trial. *Id.* at 527; *Dickey v. Florida*, 398 U.S. 30, 38 (1970). Indeed, the petitioner was helpless to demand his right to a speedy trial because the government failed to serve notice of the indictment upon him. The government failed to provide any notice despite the fact that it could have easily done so. This Court should attach a different weight to a situation in which a defendant is without knowledge of a public indictment from one in which the defendant knowingly fails to object or demand his right to a speedy trial.

Inasmuch as it is not necessary that prejudice be shown in order to prove a speedy trial violation, this court should provide petitioner his only possible remedy, reversal and dismissal of the indictment. *Moore v. Arizona*,

414 U.S. 25, 26 (1973); *Strunk v. United States*, 412 U.S. 434, 440 (1973); *Barker*, 407 U.S. at 522. Dismissal is also warranted because petitioner has demonstrated prejudice. During the period of inordinate delay petitioner was leading a normal, productive and law-abiding life. Petitioner had fully integrated himself into society. His arrest and prosecution at this late date interrupted his life as a productive member of society and forced him to answer for actions taken in the distant past. Accordingly, petitioner's conviction should be reversed.

ARGUMENT

THE HISTORY OF THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT ESTABLISHES THE RIGHT OF ALL CITIZENS TO REPOSE AND TO BE FREE FROM EXCESSIVE AND UNWARRANTED GOVERNMENTAL DELAY IN THE PROSECUTION OF ANY CRIMINAL INDICTMENT, INDEPENDENT OF ANY INTEREST IN PREVENTING LENGTHY PRETRIAL INCARCERATION OR PREJUDICE TO AN INDICTED CITIZEN.

The history of our Sixth Amendment cannot be disputed. Justice shall be delayed to no citizen. The question of whether a citizen has knowledge of a pending criminal indictment is relevant only where there is a knowing avoidance of prosecution. Justice otherwise has either been delayed or it has not. The history of the Sixth Amendment makes clear that an excessive delay in prosecuting an individual after he has been formally charged, arrested or indicted necessarily must result in dismissal

of such prosecution. *United States v. Marion*, 404 U.S. 307, 325 (1971); *United States v. MacDonald*, 456 U.S. 1, 7 (1982).

In addition, an examination of the history of the Speedy Trial Clause makes clear that it was designed to protect citizens from being prosecuted upon unknown indictments for acts which occurred in the distant past. Furthermore, where the delay in prosecuting an individual is due solely to government inaction and the government's failure to have notified the accused of a criminal indictment pending against him, the Speedy Trial Clause mandates that the stale changes at issue be dismissed.

The Sixth Amendment to our United States Constitution provides, in part, "In all criminal prosecutions. the accused *shall* enjoy the right to a speedy and public trial . . . *and to be informed of the nature and cause of the accusation*. . . . " (emphasis added). Historically, the right to a speedy trial has been considered to be "one of the most basic rights" protected by our Constitution. *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967).

An analysis of the historical basis of the Speedy Trial Clause leads to but one source: Chapter forty of the Magna Carta of 1215 (later repeated in chapter twenty-nine of the 1225 version): "*Nulli vendemus, milli negabimus ant differemus rectum vel justiciam.*" ("To no one will we sell, to no one deny or delay right or justice.") Ayars, *We Hold These Truths: From Magna Carta to the Bill of Rights*, 7 (1977). The text of the Magna Carta contained no qualifiers or exceptions. Under its express terms, the only question for consideration is whether a criminal prosecution has been excessively delayed. Implicit in such protection is the notion that some appointed time should come when a citizen is entitled to repose; that there must

be some limit upon the sovereign's ability to delay revelation of an indictment and consequently delay criminal prosecution of an accused.

Thus, "[T]he Great Charter established a system of constitutional government . . which . . . guarantees to the individual man that administrative machinery, while guiding him and protecting him will not grind him down. . . . " Pound, *The Development of Constitutional Guarantees of Liberty*, 22 (3d printing 1960). The concept that justice should be delayed to no citizen was of unquestionable importance to the drafters of the Constitution. Indeed, "[T]he Framers seem clearly to have understood and valued the right in the context of its common-law antecedents." *Dickey v. Florida*, 398 U.S. 30, 41 (1970) (Brennan, J., concurring).

In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), this Court held that, "[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Id.* at 223. It then traced the history of the Speedy Trial Clause to the Magna Carta enacted in the year 1215, and to the Assize of Clarendon enacted in 1166. *Id.* Citing Sir Edmund Coke as the preeminent legal authority to which the framers of our constitution referred, this Court stated, "To Coke, prolonged detention without trial would have been contrary to the long custom of England, *but he also believed that the delay in trial, by itself, would be an improper denial of justice.*" *Id.* at 224 (emphasis added) (footnote omitted). This Court further noted, "To Coke, . . . Magna Carta was one of the fundamental bases of English liberty." *Id.* at 225. It also observed that George Mason, the drafter of the Virginia Declaration of Rights of

1776 used language similar to Coke's in drafting that state's speedy trial declaration. *Id.*

William Penn, the founder of Pennsylvania, looked to and quoted verbatim Lord Coke when defining the meaning of justice. Penn, in the first commentary published in America on the Magna Carta, stated that one of the three essential elements of justice is that it "ought not to limp, or be granted piece-meal and [it should be] Celeris, speedily quia Dilatio est quaedum negatio, Delay is a kind of denyal. . . . " William Penn, *The Excellent Privilege of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England*, (1687), set forth in full in Howard, *The Road From Runnymede; Magna Carta and Constitutionalism in America*, 424 (Appendix D) (1968).

That the drafters of the Bill of Rights considered the right to a speedy trial fundamental is reflected by the fact that at least four states had speedy trial provisions in their declarations of rights prior to enactment of the federal Bill of Rights. The first Virginia Declaration of Rights, provided that in all "criminal prosecutions a man hath a right . . . to a speedy trial. . . . " Va. Declaration of Rights, 1776, §8.

Likewise, Massachusetts, Pennsylvania and Delaware all had constitutionally recognized the right to a speedy trial. *Klopfer, supra*, at 225-226, n.21. By 1780, four of the original thirteen colonies, along with Vermont, had adopted "a speedy trial provision creating a fundamental right against which the government could not prevail." Poulos and Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a State House*, Vol. 28, Hastings Law Journ., 357, 358 (1976) Ultimately, speedy

trial provisions proposed by the New York, North Carolina and Virginia ratification conventions led directly to the inclusion of a speedy trial provision within the Federal Bill of Rights. *Id.* at 360.[1] While commenting on the significance of the Fourth, Fifth and Sixth Amendments, this Court long ago noted that lack of inclusion of these "highly prized" rights caused "severe opposition" to the original constitution. *Ex Parte Milligan*, 71 U.S. (4 Wall.), 18 L.Ed. 281, 295 (1866).

For many years, the scope of the Speedy Trial Clause remained undefined by this Court. Although acknowledging the right of all citizens to enjoy a speedy trial in *Beavers v. Haubert*, 198 U.S. 77 (1905), this Court did not address the historical basis or scope of the right. In *Pollard v. United States*, 352 U.S. 354, 361 (1957) and *United States v. Elwell*, 383 U.S. 116, 120 (1966), this Court examined the right in light of "purposeful or oppressive" delay and "oppressive or culpable government conduct" but again failed to examine its scope in light of its historical underpinnings.

As previously discussed, in *Klopfer v. United States*, 386 U.S. 213 (1967), however, this Court engaged in an extensive analysis of the roots of the Speedy Trial Clause and concluded that the government may not "indefinitely postpone" the criminal prosecution of its citizens. In doing so, this Court specifically acknowledged the adverse impact *"the pendency of an indictment"* can have

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[1] *See, Creating the Bill of Rights, The Documentary Record from the First Federal Congress* (H. Veit, K. Bowling & C. Bickford, ed. 1991), for an excellent compilation of materials related to the creation of the Bill of Rights.

upon an individual. *Id.* at 222 (emphasis added). Similarly, in *United States v. Marion*, 404 U.S. 307 (1971), this Court held that the language and intent of the clause was clearly designed to protect only those in some way formally accused of a crime, noting, "[There] is nothing in the circumstances surrounding the adoption of the Amendment indicating that it does not mean what it appears to say. . . . " *Id.* at 314. This Court further held, "The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *Id.*

In a unanimous opinion, this Court in *Dickey v. Florida*, 398 U.S. 30 (1970), held that a seven-year delay between commencement of charges and trial violated the accused's right to a speedy trial. In doing so it reiterated the practical concerns which the Speedy Trial Clause is designed to protect. It noted: "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges *promptly exposed*. . . . Stale claims have never been favored by the law, and far less so in criminal cases." *Id.* at 37 (emphasis added) (footnote omitted). Thus, in direct language this Court acknowledged the need to provide an accused notice of the charges against him.

In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court explicitly rejected the concept that a defendant who fails to demand a speedy trial somehow waives his entitlement to it. Noting, that "[a] defendant has no duty to bring himself to trial," the Court concluded that an individual cannot be deemed to waive such a fundamental right on the basis of a silent record. *Id.* at 527. In other

words, while an individual can waive his right to a speedy trial by his affirmative act of avoiding such trial, he cannot be deemed to waive such right where he has no knowledge that it exists. Of significance to the present petition, this Court also found that "ex parte continuances," obtained without the accused's knowledge or consent, violated the Speedy Trial Clause. *Id.* at 536. Concurring in the Court's opinion, Justice White also noted the "inevitable personal prejudice" resulting from undue prosecutorial delay. *Id.* at 537.

This Court further refined the scope of the Speedy Trial Clause's protection in *United States v. MacDonald*, 456 U.S. 1 (1982). In doing so, however, it again specifically found that the "period after indictment must be considered in evaluating a Speedy Trial Clause claim." *Id.* at 7.

Current legal analysis in the state court system supports the view that the right protects citizens from unknown indictments:

> Although there is disagreement as to whether the filing of a secret indictment will trigger the speedy trial right prior to arrest, . . . there appears to be general consensus that the right to speedy trial attaches upon the formal filing of a public charge, at least if the charge is in a state form that would vest the court in which it is filed with jurisdiction to try the accused.
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> * * *
>
> *[I]t is unrealistic to assume that no adverse consequences will flow from a publicly pending criminal charge, even if the accused remains unaware that it has been filed.*

State v. Mouser, 806 P.2d 330, 339 (Alaska App. 1991) (empahsis added) (citations omitted). Additionally, where

the government has failed to place an accused on notice of charges pending against him, he cannot be faulted with having failed to assert his right to a speedy trial:

> Defendant cannot fairly be expected to assert a right to a speedy trial of which he is totally unaware because of the People's failure to fulfill their duty to alert him to the charges and to his right to demand trial. Thus, in balancing their respective conduct, this "notice" factor, essential to an assertion of the demand for trial, weighs against the prosecution and in favor of the defendant.

People v. Vila, 162 Cal.3d 76, 87 (1984), 208 Cal. Rptr. 364, 371 (Cal.2d DCA, Div. 7 1984). *See also, Taylor v. United States*, 238 F.2d 259, 262 (D.C. Cir. 1956) (finding that appellant had been denied a speedy trial the court held, "This harm would have been avoided . . . by notice to appellant that he had been indicted.").

In conclusion, it is clear that an individual cannot demand a speedy trial where the government never informs him that it seeks to try him. Unknown and unnoticed indictments are antithetical to our entire system of constitutional government. In view of the "unbroken historical usage"[2] of the Speedy Trial Clause, the government's failure to notify petitioner of the indictment pending against him, coupled with its unexcusable

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[2] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___, 113 L.Ed.2d 1, 31 (1991) (Scalia, J., concurring).

delay in bringing him to trial, compels this Court to reverse petitioner's conviction.

Respectfully submitted,

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